

Endangered Species Act Section 7 Consultation

The Endangered Species Act directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the Act. Section 7 of the Act, called **A**Interagency Cooperation,**@** is the mechanism by which Federal agencies ensure their actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species.

Informal Consultation

Under Section 7, Federal agencies must consult with the U.S. Fish and Wildlife Service when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. This process usually begins as informal consultation. A Federal agency, in the early stages of project planning, approaches the Service and requests informal consultation. Discussions between the two agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species.

If the Federal agency, after discussions with the Service, determines that the proposed action is not likely to affect any listed species in the project area, and if the Service concurs, the informal consultation is complete and the proposed project moves ahead. If it appears that the agency's action may affect a listed species, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species.

Formal Consultation and the Biological Opinion

When a Federal agency determines, through a biological assessment or other review, that its action is *likely to adversely affect* a listed species, the agency submits to the Service a request for formal consultation. During formal consultation, the Service and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the Service will prepare a biological opinion on whether the proposed activity will *jeopardize* the continued existence of a listed species. The Service has 45 days after completion of formal consultation to write the opinion.

In making a determination on whether an action will result in jeopardy, the Service begins by looking at the current status of the species, or **A**baseline.**@** Added to the baseline are the various effects **B** direct, indirect, interrelated, and interdependent **B** of the proposed Federal action. The Service also examines the cumulative effects of other non-Federal actions that may occur in the action area, including state, tribal, local, or private activities that are reasonably certain to occur in the project area.

What is Jeopardy?

The Service's analysis is then measured against the definition of jeopardy. Under the ESA, jeopardy

occurs when an action is reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced.

Alternatives and Incidental Take

When the Service makes a jeopardy determination, it also provides the consulting Federal agency with reasonable and prudent alternative actions. These alternatives are often developed with input and assistance from the Federal agency. Alternatives must:

- \$ be consistent with the purpose of the proposed project
- \$ be consistent with the Federal agency's legal authority and jurisdiction
- \$ be economically and technically feasible
- \$ in the Service's opinion, avoid jeopardy

In some cases, the Service finds that an action may adversely affect a species, but not jeopardize its continued existence. When this happens, the Service prepares an incidental take statement for the proposed Federal project. Under most circumstances, the ESA prohibits take, which is defined as harming (includes killing) or harassing a listed species. Incidental take **B** take that results from a Federal action but is not the purpose of the action **B** may be allowed when the Service approves it through an incidental take statement. The statement includes the amount or extent of anticipated take due to the Federal action, reasonable and prudent measures to minimize the take, and terms and conditions that must be observed when implementing those measures.

The Next Step

After the Service issues its biological opinion, the Federal agency then decides how to proceed. With an opinion that determines adverse effects, the agency can adopt the reasonable and prudent measures outlined in an incidental take statement and proceed with the project. If the Service makes a jeopardy determination, the Federal agency has several options:

- \$ implement one of the reasonable and prudent alternatives;
- \$ modify the proposed project and consult again with the Service;
- \$ decide not to undertake (or fund, or authorize) the project;
- \$ disagree with the opinion and proceed;
- \$ apply for an exemption.

A Federal agency may apply for an exemption if it believes it cannot comply with the requirements of the biological opinion. The application is considered by the Endangered Species Committee, comprised of Cabinet-level members from various Federal agencies and administered by the Interior Department's Assistant Secretary for Policy, Management and Budget. To be considered by the Committee for an exemption, a Federal agency must have carried out the consultation in good faith and made a reasonable effort to develop and consider modifications or alternatives to the proposed action. It must also have

conducted any required biological assessment, and refrained from making any irreversible or irretrievable commitment of resources to the project during consultation.